

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MATTHEW C.

Claimant,

vs.

CENTRAL VALLEY REGIONAL
CENTER,

Service Agency.

OAH No. N2005110363

DECISION

Administrative Law Judge Robert Walker, State of California, Office of Administrative Hearings, heard this matter in Visalia, California, on February 27, 2006.

Shelley Celaya, Client Appeals Specialist, represented Central Valley Regional Center.

Shaun C., claimant's mother, represented the claimant, Matthew C.

ISSUE

Regional center provides claimant with 15 hours a week of applied behavioral intervention. Is claimant entitled to 20 hours a week?

FACTUAL FINDINGS

BACKGROUND

1. Claimant, Matthew C., was born on September 28, 1993. He is 12 years old. Claimant had multiple medical problems at birth and has been a regional center consumer since he was 10 days old. His medical conditions include pulmonary stenosis, bilateral

sensorineural hearing loss, mixed muscle tone, vision impairment, scoliosis, chronic sinusitis, and asthma. His diagnoses include Noonan-Leopard syndrome and autism. He takes numerous medications. He has had heart surgery. He wears hearing aids in both ears and requires corrective glasses.

2. Claimant is nonverbal. He knows approximately nine signs in American Sign Language. He is beginning to communicate through a picture exchange system. Claimant receives special education services from Kings County Office of Education. He is in a special day class for severely handicapped students.

3. Claimant lives at home with his parents and two teenaged sisters. One of his sisters has a cochlear implant and requires a great deal of the parents' attention.

4. Regional center provides claimant with 32 hours of respite care each month and with an in home behavior management program in the form of applied behavioral intervention.

5. Claimant was seven years old when he was diagnosed with autism spectrum disorder. Immediately after he was diagnosed, his parents began asking regional center to provide a program that would target his autism. Regional center contends that there were no appropriate services available in the area at that time. Claimant was placed in a number of programs, but none of them seemed to work for him. From November of 2002 to April of 2005, regional center provided a discrete trial training program through a vendorized personal care assistant. The program focused on a picture exchange communication system.

6. In May of 2005, regional center retained Teaching Autistic Children (TAC) to provide an applied behavioral intervention program in claimant's home. The parties agree that this was the first time claimant had a program that appropriately addressed his autistic spectrum disorder. The model TAC uses involves behaviorists going into claimant's home before and after school to teach him to change certain targeted behaviors. For the sake of consistency, TAC consults with people who work in claimant's school based program. TAC also provides some training for claimant's parents so that they can reinforce the work of the behaviorists. But the behaviorists spend most of their time working directly with claimant on the behavior intervention program. They also maintain records of claimant's progress or lack of progress.

TESTIMONY OF REGIONAL CENTER'S WITNESSES

7. Shannon Dicks is claimant's regional center case manager. Ms. Dicks testified in the proceeding in this matter. She began managing claimant's case in March of 2000. Ms. Dicks acknowledged that claimant failed to make progress through the program the regional center provided before it began using TAC. During part of that time, however, he did make slow progress in the program the school district provided. Ms. Dicks testified that there was no autism specialist in the area until May of 2005 and that, as soon as one became available,

regional center provided the service to claimant. She testified that, since May of 2005, claimant has made progress in some areas but has failed to make progress in others.

8. Ms. Dicks testified that an overall goal for claimant is to help him acquire the skills he will need in order to be as independent as possible.

9. In the summer of 2005, a dispute arose as to the number of hours of TAC services regional center would provide. After mediation, claimant and regional center entered into an agreement according to which regional center would provide 30 hours a week during August when claimant would be out of school. It was further agreed that regional center would provide 20 hours a week in September and October and 15 hours a week beginning in November.

10. At the beginning of November, claimant's mother asked regional center to amend their agreement and continue to provide 20 hours a week. Regional center refused. By a fair hearing request dated November 9, 2005, claimant's mother appealed regional center's refusal to provide 20 rather than 15 hours a week of behavior management services. The hearing in this matter followed.

11. Emily Branscum, Ph.D., BCBA, a behavior services consultant, has a contract with regional center to review reports concerning the behavior programming services that regional center provides to its consumers. As part of her work, Dr. Branscum reviewed three of TAC's reports concerning claimant and wrote an evaluation dated December 19, 2005. The TAC reports are dated June, July, and October of 2005. Dr. Branscum has never met claimant. Her evaluation concerned only her review of the TAC reports.

12. The TAC reports are difficult to follow because the numbers assigned to goals change from one report to the next. For example, in the June report, goal 1.3 is "put pants on independently 4 out of 5 trials." In the July report, however, goal 1.3 is "independently wash . . . hands 4 out of 5 trials." Moreover, a goal that is identified in one report as having been met, may – without any explanation – be listed in a subsequent report as a goal to be met. For example, the goal of putting pants on independently is in the June report as goal 1.3 and is shown as "met." That goal is in the July report as 1.5 and, again, is shown as "met." That goal is in the October report as 1.4 but, without any explanation, is listed as a goal to be pursued for three months.

13. Dr. Branscum noted that the reports indicate that claimant was failing to progress regarding goal 1.3. But one cannot be sure of what Dr. Branscum means by that, because TAC does not use 1.3 consistently to identify a single goal.

14. Dr. Branscum was critical of the TAC reports. She was critical of TAC's introducing new goals before existing goals were met. Also, she concluded that TAC was pursuing academic goals that should be left to claimant's school program.

15. Dr. Branscum concluded that claimant "continues to make good progress."

16. Dr. Branscum, however, recommended a number of changes. She recommended that academic goals not be targeted in the home program but left to the school. She recommended that behaviorists no longer go into the home for extensive hours to work directly with claimant. She is of the opinion that a different model is more appropriate. She recommends that behavior management consultants go into the home for only a few hours a week to train the parents to work directly with claimant on the behavioral intervention program and to train the parents to maintain records of claimant's behaviors. Dr. Branscum's ultimate recommendation was to move in the direction of using consultants to train the parents to implement claimant's program by reducing the behaviorists' time in the home to 10 hours a week. (In spite of Dr. Branscum's recommendation of 10 hours a week, regional center has agreed to provide 15 hours. Thus, as noted above, the issue is whether claimant's hours should be increased from 15 to 20 as his parents have requested.)

17. Dr. Branscum, in addition to writing an evaluation, testified at the hearing in this matter. She testified that she holds a masters degree in psychology and a Ph.D. in developmental psychology. In her Ph.D. program, she emphasized early childhood development. She has practiced in the field for 15 years and currently is in private practice. In her testimony, she reiterated much of what she wrote in her evaluation of December 19, 2005.

18. There was one respect in which Dr. Branscum's testimony diverged from her written evaluation. As noted above, in her evaluation, she wrote that claimant "continues to make good progress." In her testimony, however, she said that claimant is making some progress, but – because the data in TAC's reports is inadequate – it is difficult to discern how much.

19. Dr. Branscum testified that there have been studies concerning the effectiveness of the model that TAC is using. She said that some studies have shown that that model can produce results for a child up to 10 years old. (Dr. Branscum did not say whether the method TAC is using has been shown not to produce results in children over 10 years old or whether that matter simply has not been studied.)

20. Dr. Branscum testified that a child who is in school six hours a day should have no more than two hours a day of in home behavioral intervention. Thus, she is of the opinion that claimant's in home program should not be more than two hours a day, five days a week.

21. Dr. Branscum testified, also, that long-term applied behavioral intervention by a behaviorist can be counter productive. It can cause a child to become "therapist dependent." That is, it can cause a child to be able to engage in appropriate behaviors for the therapist or behaviorist but leave the child unable to engage in those behaviors when the therapist or behaviorist is not present.

22. Dr. Branscum was cross examined about her criticism that TAC was pursuing academic goals. She acknowledged that a particular goal can be both academic and

functional. She testified that, when a goal is included in a home based program, it should be expressed in a way that limits it to functional matters. For example, if using sign language is a goal in a home based program, it should be tied to some functional matter in order to make it clear that the program is not pursuing some academic goal such as learning prepositions.

23. Dr. Branscum also acknowledged that she could do a more thorough job of assessing a consumer's needs if she observed and interacted with him or her. But regional center has retained Dr. Branscum only to evaluate written reports.

24. As noted above, Shannon Dicks is claimant's regional center case manager. Gloria Guzman, MS, is a program manager at the regional center and supervises Ms. Dicks. Ms. Dicks and Ms. Guzman wrote a letter dated December 22, 2005, to Eve Neely, Clinical Director of TAC. In the letter, they reviewed Dr. Branscum's evaluation. They wrote that they continue to have concerns about the appropriateness of many of the goals TAC has set for claimant because they appear to deal with academic rather than functional matters. Ms. Dicks and Ms. Guzman wrote that they were also concerned about TAC's failure to train claimant's parents to implement claimant's program. While the tone of the letter was critical, Ms. Dicks and Ms. Guzman began their letter by saying that they were "very happy with the progress that Matthew is making in the areas of functional communication and self-care/independent living skills."

TESTIMONY OF CLAIMANT'S WITNESSES

25. Justin McCoy is the executive director of TAC. The following is a paraphrased summary of Mr. McCoy's testimony. Claimant's progress has been assessed with the Brigance Inventory of Early Development (Brigance). Also TAC's behaviorists have assessed claimant's progress through direct observation. TAC's recommendations regarding hours depends on the level of a child's deficits and on the character of the program being used. In designing a program and in recommending hours, TAC considers a child's school based program.

26. William Brandon, President and CEO of TAC, testified. The following is a paraphrased summary of his testimony. He is a Ph.D. candidate in early childhood development, and he does curriculum development for TAC. The Brigance was administered to claimant in January of 2005. TAC began working with claimant in May of 2005. In October of 2005, TAC administered the Brigance again. Mr. Brandon testified that comparing the scores from the two administrations of the Brigance shows that claimant has made progress. The scores are as follows: In gross motor skills and behaviors, the January score was 1 to 6 years, and the October score was the same. In fine motor skills and behavior, the January score was 1 month to 4 years, but the October score was 1 year to 5 years, which indicates improvement. In self-help skills, the January score was 7 months to 5 years, but the October score was 1 year and 3 months to 5 years, which indicates improvement. In speech and language skills, the January score was 1 month to 1 year and 3 months, but the October score was 1 month to 3 years, which indicates improvement. In social and emotional development, the January score was 1 month to 5 years and 6 months

and the October score was not much different. In general knowledge and comprehension, the January score was 1 year and 6 months to 2 years, but the October score was 1 year and 6 months to 5 years and 6 months, which indicates improvement.

27. Mr. Brandon testified that TAC does not pursue goals for academic purposes. He said that many goals are pursued both by schools for academic purposes and by behaviorists for functional purposes. He said that, therefore, TAC must pursue some goals that are also appropriate for claimant's school program. He insists, however, that TAC pursues such goals for functional – and not for academic – purposes.

28. Mr. Brandon disagreed with Dr. Branscum's recommendation that behaviorists no longer go into the home for extensive hours to work directly with claimant. Mr. Brandon testified that that approach, which is the one TAC is using, is appropriate for an overall intervention strategy, which is what claimant needs. He said that the model Dr. Branscum recommends, which emphasizes training parents to implement interventions, is more appropriate for targeting very specific maladaptive behaviors.

29. Mr. Brandon testified that, at some time, it will be appropriate for the applied behavioral intervention services that TAC is providing to be terminated. When that should happen depends on a number of factors such as whether claimant continues to make progress and whether other appropriate services are available in the community.

30. Melissa Altamirano is a regional supervisor for TAC. Ms. Altamirano testified. She has worked with autistic children for 11 years and is in a graduate program at Fresno State University. Ms. Altamirano has reviewed reports concerning claimant, has observed him at home and at school, and has occasionally worked with him directly. She has observed an increase in claimant's functional communication skills. And she has observed a corresponding decrease in his level of frustration. Ms. Altamirano testified that claimant has benefited from 22.5 hours of intervention a week and that he needs more than 15 hours a week. She testified that there is nothing that TEC is doing that should be reduced or eliminated.

31. Ms. Altamirano addressed the matter of academic versus functional goals. She said that TAC is targeting goals for the purpose of helping claimant acquire skills that he needs at home. She reiterated Mr. Brandon's testimony that it often is appropriate to target a goal for both academic and functional purposes.

32. John Rogers is a behaviorist who has worked closely with claimant. Mr. Rogers testified. He has a degree in psychology and, since June of 2003, has worked with children diagnosed on the autism spectrum. Mr. Rogers testified that claimant is a hard worker and can handle a school program and a 20 hour a week home program. He testified that, while claimant could benefit from a 15 hour a week program, he benefits more from a 20 hour a week program.

33. Claimant's mother testified. The following is a paraphrased summary of her testimony. She works and has other children who demand her attention. She would not have the time to do what Dr. Branscum proposes. For over four years, regional center failed to provide an appropriate program to address claimant's autism. The programs regional center did provide did not work. The TAC program is helping claimant, but he is still significantly delayed in developing many skills. Regional center should maximize his opportunity to improve his skills and make up for those years in which he went without the services to which he was entitled.

LEGAL CONCLUSIONS

AN OVERVIEW OF THE LAW REGARDING THE SERVICES TO WHICH CLAIMANT IS ENTITLED

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act),¹ is an entitlement act. People who are eligible under it are entitled to services and supports.²

The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (citations) and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community (citations).³

2. Persons with developmental disabilities have "a right to dignity, privacy, and humane care," and services and supports, when possible, should be provided in natural community settings.⁴ Persons with developmental disabilities have "a right to make choices in their own lives" concerning "where and with whom they live."⁵ Regional centers should assist "persons with developmental disabilities and their families in securing those services and supports . . . [that] maximize opportunities and choices for living, working, learning, and recreating in the community."⁶ Regional centers should assist "individuals with

¹ Welf. & Inst. Code, § 4500, et seq.

² *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.

³ *Id.* at p. 388.

⁴ Welf. & Inst. Code, § 4502, subd. (b).

⁵ *Id.* at § 4502, subd. (j).

⁶ *Id.* at § 4640.7, subd. (a).

developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices.”⁷

3. In *Williams v. Macomber*,⁸ the court of appeal addressed the Lanterman Act and said:

“In order for the state to carry out many of its responsibilities as established in this division,” the Act directs the State Department of Developmental Services to contract with “appropriate private nonprofit corporations for the establishment of” a “network of regional centers.” (§§ 4620, 4621.) Regional centers are authorized to “[p]urchase . . . needed services . . . which regional center determines will best” satisfy the client's needs. (§ 4648.) The Act declares: “It is the intent of the Legislature to encourage regional centers to find innovative and economical methods” of serving their clients. (§ 4651.) The Act directs that: “A regional center shall investigate every appropriate and economically feasible alternative for care of a developmentally disabled person available within the region.” (§ 4652.)

. . .

[T]he Regional Center’s reliance on a fixed policy is inconsistent with the Act’s stated purpose of providing services “sufficiently complete to meet the needs of each person with developmental disabilities.” (§ 4501.) The Act clearly contemplates that the services to be provided each client will be selected “on an individual basis.” (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d 384, 388.)

A primary purpose of the Act is “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family.” (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d 384, 388.) In strong terms, the Act declares: “The Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families” requiring the state to “give a very high priority to the development and expansion of programs designed to assist families in caring for their children at home.” (§ 4685, subd. (a).) In language directly applicable to the present case,

⁷ *Id.* at § 4648, subd. (a)(1).

⁸ (1990) 226 Cal.App.3d 225.

section 4685, subdivision (b), states that “regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child” (§ 4685, subd. (b).)

The Lanterman Act “grants the developmentally disabled person the right to be provided at state expense with only such services as are consistent with its purpose.” (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d 384, 393.)

As noted previously, a primary purpose of the Act is to “minimize the institutionalization of developmentally disabled persons and their dislocation from family.”⁹

4. Two of the provisions the court quotes from the Lanterman Act bear repeating. They emphasize the importance of providing services and supports that make it possible for families to withstand the trials associated with keeping a disabled person at home.

[R]egional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home¹⁰

Regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child, before considering out-of-home placement alternatives.¹¹

5. In giving examples of services and supports that should be considered, the act specifically mentions treatment, education, behavior training and behavior modification, daily living skills training, and social skills training.

“Services and supports for persons with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be

⁹ *Id.* at pp. 232-233.

¹⁰ Welf. & Inst. Code, § 4685, subd. (b)(1).

¹¹ *Id.* at § 4685, subd. (c)(2).

made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to . . . treatment . . . education . . . behavior training and behavior modification . . . daily living skills training . . . [and] social skills training . . .¹²

REQUIREMENT THAT REGIONAL CENTERS BE COST CONSCIOUS

6. While the Lanterman Act emphasizes the services and supports to which consumers are entitled, the act also requires regional centers to be cost conscious.

[I]t is the . . . intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and *reflect the cost-effective use of public resources*. (Emphasis added.)¹³

7. When selecting a provider of consumer services and supports, the regional center, the consumer, or where appropriate, his or her parents, legal guardian, conservator, or authorized representative shall consider, "the cost of providing services or supports of comparable quality by different providers, if available."¹⁴

8. The Lanterman Act requires regional centers to do a number of things to conserve state resources. For example, it requires regional centers to "recognize and build on . . . existing community resources."¹⁵

9. None of these provisions concerning cost-effectiveness detracts from the fact that eligible consumers are entitled to the services and supports provided for in the Lanterman Act. These provisions concerning cost-effectiveness do teach us, however, that cost-effectiveness is an appropriate concern in choosing how services and supports will be provided. Nevertheless, there is a tension between the requirement that services and supports

¹² *Id.* at § 4512, subd. (b).

¹³ *Id.* at § 4646(a).

¹⁴ *Id.* at § 4648(a)(6)(C).

¹⁵ *Id.* at § 4685(b).

be cost-effective and the proposition that entitlement is determined by what is needed to implement a consumer's individual program plan. If it were not for the requirement that services and supports be cost-effective, a consumer would be entitled to anything that had any tendency at all to promote the implementation of his or her individual program plan. But the entitlement provisions must be read in conjunction with the cost-effectiveness requirement. Also, one must consider the entire array of services and supports that are in place in judging whether a consumer needs and is entitled to an additional service or support. Again, the cost-effectiveness of a particular service or support must be measured against the extent to which it will advance the goal specified in the IPP, and consideration must be given to alternative means of advancing the goal.

DETERMINATION REGARDING CLAIMANT'S ENTITLEMENT TO 20 HOURS A WEEK OF SERVICES

10. On balance, it is determined that claimant is entitled to 20 hours a week of applied behavioral intervention.

11. Ms. Dicks testified that claimant failed to make progress through the programs regional center provided before it began using TAC. And claimant's mother reiterated that testimony.

12. It is true that TAC's reports are not as helpful as they should be in documenting the level of claimant's progress. But there is a consensus that, since TAC became involved, claimant has made progress. And it is fair to conclude that part of claimant's progress resulted from the work TAC did. Dr. Branscum testified that, because the data in TAC's reports is inadequate, it is difficult to discern how much progress claimant is making. In her evaluation, however, she wrote that claimant "continues to make good progress." In the letter of December 22, 2005, that Ms. Dicks and Ms. Guzman wrote, they said that they were "very happy with the progress that Matthew is making in the areas of functional communication and self-care/independent living skills." Mr. Brandon testified that comparing the scores from the two administrations of the Brigance shows that claimant has made progress. And, indeed, the scores do support that conclusion. Ms. Altamirano has observed an increase in claimant's functional communication skills and a decrease in his level of frustration. Mr. Rogers, who has worked closely with claimant, is of the opinion that claimant needs a 20 hour a week program.

13. Claimant is entitled to treatment, education, behavior training, behavior modification, daily living skills training, and social skills training. He is entitled to those things in order to minimize the risk that his family will find it necessary to institutionalize him. He is entitled to those things in order to enable him to approximate the pattern of everyday living of nondisabled persons his age. And he is entitled to those things in order to enable him to lead a more independent and productive life in the community.

14. It is determined that claimant has proven that he benefited significantly from a 20 hour a week behavior management program and that fewer hours probably would result in less progress.

15. It is determined that the 20 hour a week program is cost-effective in helping claimant achieve Lanterman Act objectives.

16. Dr. Branscum is well qualified, and her testimony is entitled to substantial weight. She may be correct that, generally, a treatment model different from the one TAC is using is preferable. And she may be correct that, with that different model, 10 hours a week is the appropriate number of hours. But she did not observe or evaluate claimant. The fact that claimant has been making progress for the first time in five years – combined with the opinions of the people who have been working with him – support a conclusion that it is appropriate to continue the 20 hours a week.

17. With regard to the concern that TAC may be pursuing goals that would more appropriately be pursued in the school, it is determined that many goals are appropriate in both a school program and a home program. TAC should take care to specify the functional reasons for pursuing goals, and TAC should pursue goals only for functional reasons. But it would not be possible for TAC to avoid all goals that are appropriate in a school program.

ORDER

Claimant's appeal from regional center's refusal to provide 20 hours a week of applied behavioral intervention is granted.

DATED: March 15, 2006

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

Notice: This is a final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.